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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NO. 995

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *Petitioner,*

-v-

PIEDMONT AVIATION, INC., *Respondent.*

On Petition for Writ of Certiorari

BRIEF OF PIEDMONT AVIATION, INC. IN OPPOSITION

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COUNTERSTATEMENT OF THE CASE

The Airlines' Transition To Twin Jet Aircraft

Approximately ten years ago, twin turbine-powered transport aircraft were introduced into the air carrier industry (Saunders,[1] p. 1, ¶2). These short-haul aircraft were designed and manufactured for operation by a crew complement of two people, a pilot and co-pilot (Saunders, Supp., pp. 1-3 ¶¶ 1-4; Tadlock, pp. 1-2, ¶¶1-2). They were exhaustively tested and certified by the Federal Aviation Agency for safe opera-

[1]Affidavits of record are referred to by the last names of the affiants.

tion by such a crew complement (Saunders, pp. 2-3, ¶4; Tadlock, p. 2, ¶2).

By late 1965, the majority of domestic air carriers, including Piedmont's principal competitors, had purchased and were utilizing these aircraft (Saunders, p. 2, ¶3; p. 7, ¶13). At that time, after having made a thorough evaluation of its own, Piedmont ordered twelve Boeing 737 turbo jets to be delivered in 1968 at a cost in excess of $40,000,000 (Saunders, p. 3, ¶6; p. 8, ¶16).

At various times during this period, the airlines which purchased such jets bargained with the petitioner, Air Line Pilots Association, on crew complements for the new jet equipment. Such bargaining invariably resulted in contracts providing for operation by a two-man crew (Saunders, p. 2, ¶3; p. 5, ¶9; p. 7, ¶¶12-13). The Union continued, by contractual arrangements, to approve two-man crew complements until after mid-year 1966.

The Union's Decree — No Additional Two-Man Crews And No Bargaining On The Subject

At a private convention in August 1966, by amendment to its constitution, the Union issued a "mandatory policy" which directed that "all future turbine-powered transport aircraft will be . . . manned by a minimum crew of three pilots" (Saunders, p. 5, ¶9; Tadlock, Exhibit C). Elsewhere, the Union's constitution ordered its negotiators to "function" in accordance with such "policy" and provided for fines, sus-

pension or expulsion of any member who might violate such order (Saunders, p. 4, ¶8).

The Union's edict was issued unilaterally, without any actual notice to Piedmont, approximately one year before any notice such as is required by Section 6 of the Railway Labor Act, 45 U.S.C. § 156, was served by either party with respect to jet crew complements.

The Union's Adamant Refusal To Bargain

Pursuant to Section 6 notices, which were served by the parties on July 27 and 28, 1967, the subject of crew complement for Piedmont's forthcoming jets was raised at bargaining sessions in the Fall of that year (Bradley, pp. 1-2, ¶¶3-5). The Union's initial proposal was accompanied by "assertions that compulsory policy of the Union as established in its by-law 'bound' its negotiators to refrain from bargaining for operation of the Boeing 737 by a two-man crew" (Bradley, p. 2, ¶5).

Thereafter, the parties met in numerous bargaining sessions up to July 24, 1968 (Bradley, pp. 2-3, ¶6). Throughout all of these sessions, the Union's negotiators consistently, steadfastly and repeatedly advised the Company that they "would not bargain for a crew of less than three men, because the Union's constitution and by-law policy forbade such bargaining over that subject" (Saunders, p. 6, ¶11; Tadlock, p. 2, ¶3; Bradley, pp. 1-4,¶¶2, 5, 7). During these meetings the Union's chief negotiator admitted to Piedmont representatives that even ". . . if the committee signed a

two-man contract with Piedmont, such contract would be rejected by the Union's President" (Saunders, p. 6, ¶11). None of the foregoing has been denied by the Union.

Finally, on July 24, 1968, it was agreed that bargaining sessions would be suspended pending a decision on arbitration of a similar issue between the Union and United Air Lines. That agreement provided that in the event the arbitration decision required a three-man complement on United planes, Piedmont and the Air Line Pilots Association would "reopen negotiation[s] under the provisions of the Railway Labor Act for 3-man operations and rates of pay" (Shipton, Exhibit B; Saunders, p. 9, ¶18).

The United arbitration decision was handed down in two parts on February 10 and 22, 1969. This decision left the issue unresolved and called for further evaluation and a new arbitration in the event agreement was not reached between United and the Union (Kozak, Exhibits D and E).

Shortly after issuance of that decision, meetings were resumed between Piedmont and the Union. However, the Union continued in its flat refusal to bargain, adding as an attempted justification for such refusal, a claim that it understood the July 24 agreement to constitute a requirement that Piedmont was bound to operate with a three-man crew without bargaining (See Savelson, Exhibit A, p. 3, allegation 12).

In the Spring of 1969, pilot unrest over the failure of the parties to settle the issue became intensified

to a point that the Union felt it necessary to make an explanation. On May 20, Master Executive Council Chairman Kozak wrote a letter to all pilots (Tadlock, Exhibit C). Kozak, acknowledging that the crew complement issue was a serious problem, quoted the Union's "mandatory crew manning policy" and the constitutional restriction which limited decision-making power of union negotiators to those items not "provided [for] elsewhere in the Constitution and By-Laws." After listing the penalties for disobedience of the Union's policy, Kozak summarized: "These are just the hard, cold *facts*. . . . Our latitude in resolving this particular problem is very limited."

The Union's Lawsuit For "Breach of Contract"

On the basis of its claim that Piedmont was bound to a three-man crew by the July 24, 1968 agreement, the Union instituted suit in the United States District Court for the District of Columbia on June 30, 1969 (Savelson, Exhibit A). In its complaint, the Union characterized that document as a "collective bargaining agreement" which required "that Piedmont's Boeing 737 aircraft would continue to be operated with a three pilot crew" (Savelson, Exhibit A, p. 3, ¶¶11-12). With its complaint, the Union moved for a preliminary injunction ". . . directing defendant [Piedmont] to operate Boeing 737 aircraft with a three pilot crew complement" (Savelson, Exhibit A, p. 9, ¶1(b)). That motion was denied by Judge Corcoran upon affidavits and without testimony or opportunity for presentation of testimony and cross ex-

amination of witnesses (Savelson, p. 2, ¶4; Exhibit F). Piedmont has never sought any relief on its pleadings in the District of Columbia case and there has been no hearing on that subject.

The Proceedings Before The Courts Below

The instant case was initiated in the District Court in North Carolina upon complaint of Piedmont that the Union's unilateral action in ordering that jet aircraft be flown only by minimum crews of three pilots, coupled with its refusal to bargain on the subject, was a direct violation of the requirements of Section 2 of the Railway Labor Act, 45 U.S.C. §152. There has been no testimony or cross examination of witnesses in the case.[1] Piedmont's motion for a preliminary injunction was granted upon the basis of documentary evidence and affidavits only.

The Union moved for a stay of the injunctive order. In denying such motion, the District Judge offered the alternative of an expedited trial on the merits. The Union rejected the Court's offer (App.,[2] p. 1) and elected to appeal immediately.

The Court of Appeals below "accelerated this interlocutory appeal" (Pet. App.,[3] p. 2a) and amended the

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[1]By tacit consent of the Court and the parties, Section 7 of the Norris-LaGuardia Act, 29 U.S.C. §107, requiring testimony in open court was waived (Appendix to the Petition, p. 6a, fn. 7).

[2]Appendix to this brief.

[3]Appendix to the Petition for Certiorari.

District Court's order by adding ". . . as a condition to injunctive relief, maintenance of working conditions and established practices in existence before the strike, including three-pilot crews and the rate of pay in effect on July 20, 1969" (Pet. App., p. 9a). Thus, that part of the order accords to the Union precisely the same relief which it sought in its motion in the District of Columbia case.

SUMMARY OF ARGUMENT

This Court does not disturb factual determinations of lower courts in cases where there is no showing of very obvious and exceptional error. No such error has been shown to exist in this case. The composite findings of the District Court and the Court of Appeals below that the Union violated the compulsory bargaining requirements of the Railway Labor Act are supported by an abundance of evidence which, for the most part, is uncontradicted. The Air Line Pilots Association, therefore, is bound by that factual determination on this interlocutory appear.

As amended by the Court of Appeals, the injunctive order bars removal by Piedmont Aviation, Inc. of the disputed third crewman from its jet equipment. The Union has sought precisely such an order against Piedmont in a lawsuit of its own in the District Court for the District of Columbia. In that case, the Union contended that the *status quo ante* should be maintained until the rights of the parties had been adjudi-

cated. That is exactly the purpose and effect of the order for which the Union now petitions this Court for a writ of certiorari.

The Court of Appeals remanded the case with directions for the District Court to resolve the threshhold question of whether the Court has jurisdiction. Resolution of that issue, as well as other unsettled issues in the case, could result in a disposition of the controversy without a trial on the merits. Accordingly, the case is not ripe for review by this Court and the petition is premature.

There is no authority from any source which supports the Union's contention that a finding that it has refused to bargain was precluded in this case by obiter dictum of the District Court for the District of Columbia in the Union's case, which recited that "the parties" have bargained in good faith.

The Union's assertion that the decision in this case is in conflict with decisions from other courts of appeals is without any foundation. It cites only two cases involving the Railway Labor Act[1] to support its contention. In each of those cases, the Court of Appeals for the Second Circuit held that no injunction should be granted because, and only because, it was found that the union had not failed to bargain in good faith, which is precisely contrary to the finding of the Courts below in the instant case.

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[1]*Chicago, Rock Island and Pacific R. R. v Switchmen's Union,* 292 F. 2d 61 (2nd Cir. 1961); *Pan American World Airways, Inc. v. Flight Engineers Int'l. Ass'n.,* 306 F. 2d 840 (2nd Cir. 1962).

All other cases cited by the Union[1] to support its claim that conflict exists involved procedural questions of venue only. In each of those three cases, the court of appeals reviewed a discretionary ruling of the district court and in each the result was controlled by the facts peculiar to that case. In this case, the discretionary ruling of the District Court has been reviewed and sustained by the Court of Appeals. There is no conflict with the decisions from other circuits, and it is well settled that this Court will not review such decisions.

Issuance of the injunctive order below is in accord with, and is fully supported by, pronouncements of this Court and numerous decisions of various courts of appeals and district courts. These decisions uniformly hold that the Railway Labor Act takes precedence over the Norris-LaGuardia Act and refute the Union's contention that the District Court was precluded by the Norris-LaGuardia Act from issuing the injunctive order in this case.

ARGUMENT

I. There Is No Reason For Issuance Of A Writ Of Certiorari

The central, all-pervading and ultimately determinative question in this case is whether the Union

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[1] *Hilton Hotels Corp. v. Weaver,* 325 F. 2d 1010 (D. C. Cir. 1963); *Crosley Corp. v. Hazeltine Corp.,* 122 F. 2d 925 (3rd Cir. 1941); *Brotherhood of Locomotive Firemen & Enginemen v. Central of Georgia Ry.,* 411 F. 2d 320 (5th Cir. 1969).

fulfilled its collective bargaining obligations under Section 2 First and Second of the Railway Labor Act, 45 U.S.C. §152 First and Second, and thereby exhausted all remedies therein provided, before it took strike action against Piedmont. The injunctive order of which the Union complains was issued to preserve the *status quo ante* pending resolution of that crucial question by the Court below.

Yet it will readily be observed that the Union has not even addressed itself to that question in its petition to this Court. The Union, instead, has avoided the real issue and has proceeded throughout its petition on the totally unwarranted assumption that it has been judicially established that the Union bargained collectively and in good faith at all times and has thereby exhausted all remedies provided for in the Act. Its often repeated naked assertions that all such remedies have been fully exhausted are coupled with a recitation to the Court of mere contentions of the Union, as if they were judicially-established fact.

The end result is a petition which presents to the Court hypothetical questions which bear little resemblance to the real issues involved.

A. The Petition Is Premature

Throughout its petition, the Union treats the case as if Piedmont is authorized by the existing order to remove unilaterally the third crew member from its jet equipment and, if it does so, the Union would have no recourse whatever. The true facts are to the contrary.

As has been noted, shortly before institution of this case, the Union filed suit in the District of Columbia, seeking an injunction "directing defendant [Piedmont] to operate Boeing 737 aircraft with a three pilot crew complement . . ." until expiration of the United Air Lines contract with the Union on March 2, 1970, five weeks hence. The objection most vigorously urged by the Union upon the Court of Appeals for the Fourth Circuit was its claim that the injunction issued by the District Court in North Carolina unfairly authorized unilateral action by Piedmont while at the same time it prohibited retaliatory action by the Union. The Court of Appeals granted relief to the Union by adding the condition, quoted above, that Piedmont shall only operate its jets with three-man crews.

The obvious effect of the condition attached by the Court of Appeals was a nullification of all that portion of the District Court's injunction to which the Union actually had objections. The aircraft are now flying with three-man crews and at rates of pay which were in effect before the strike and litigation. *If Piedmont should elect to remove the third pilot from its airplanes, the Union would be completely free to resume its strike as if no court order had ever been entered.*

As matters now stand, the sole compulsion upon the Union in the order of the Courts below is a prohibition against its taking unilateral action against Piedmont so long as the Company maintains the

status quo ante. But the Union has consistently asserted throughout all the litigation that it has no desire to strike and has repeatedly insisted that *status quo ante* conditions be maintained so that no strike would be necessary.

For example, in the District of Columbia case, union counsel summarized that:

> "A preliminary injunction is necessary to preserve the status quo until a final decision can be made. The choice would seem to be unilateral action by Piedmont with a response [or strike] by the pilots or an orderly process by which the parties can determine their respective obligations under the [July 24] agreement, and then go forward.
>
> "The pilots have opted at this time for a preliminary injunction to preserve the status quo so that each side will be fully aware of its legal obligations and will be able to carry them out *before any economic action or economic battle ensues on the airline*" (emphasis added) (App., p. 2).

It appears, therefore, that what the Union actually is seeking in its petition for a writ of certiorari is a plotting of the course which the case shall follow when it comes to trial on the merits in the District Court below. The Union has not dealt with the question of why this Court should be expected to review the case at this time when the Union's claims of immediate injury by the injunctive order in the District Court have been adequately remedied by the

Court of Appeals and when every question raised in the case may be mooted in the District Court upon the remand already ordered by the Court of Appeals.

There are several circumstances in this case which could moot the issues upon remand. At least one such circumstance looms at the very threshhold and certainly should be dealt with before any review is undertaken by this Court. The parties have proceeded throughout on the theory that the case involves a "major dispute" under the Railway Labor Act. Both parties still contend that it is such a dispute.

The fact remains, nevertheless, that the Court of Appeals found that "lurking in the shadows . . . is the suggestion made by the City of Roanoke, Virginia, *amicus curiae*, that the controversy is a minor dispute" (Pet. App., p. 10a). It was decreed "therefore, [that] the district court should not decide the case on its merits unless it is clearly shown . . . that the controversy is still a major dispute" (Pet. App., p. 11a). It was further directed that in the event the dispute is found to be a "minor" one, it must be resolved by the System Board of Adjustment through binding arbitration procedures provided for in the Act.

Surely the Court should not be put to the task of passing upon the merits of the case when it is so obvious that it may never reach a trial upon the merits.

> "We feel that we should not pass upon any of the complicated and delicate questions involved in the case . . . upon an appeal from a mere inter-

locutory injunction and upon the inadequate record now available, but should await the completion of the hearing in the court below, at which time it will be possible to consider the questions upon an adequate record and avoid a fragmentary hearing. . . ."

Sims v. Central Trust Co., 123 F. 2d 89, 90 (4th Cir. 1941)

"[A]s the case is yet to be heard . . . upon the facts, it is undesirable that we discuss the evidence or make statements with regard thereto which might be seized upon by the parties as indicating an opinion on our part as to how the case should be decided. The principles of law involved are important and difficult of application to the facts; and we should refrain from discussing them until the case to which they are to be applied is before us in final form."

Meiselman v. Paramount Film Distributing Corp., 180 F. 2d 94, 96 (4th Cir. 1950)

B. There Is No Conflict Among The Courts Of Appeals

All of the decisions of the courts of appeals on the subject in question apply uniform legal principles to various sets of facts. The petitioner has failed to accept the significance of Rule 19.1 (b) of this Court, which makes it plain that a conflict of circuits is created only when decisions are in conflict "on the

same matter." Obviously, a conflict is not created when one court of appeals refuses to grant a preliminary injunction on one set of facts and another court of appeals grants a preliminary injunction on a different set of facts.

1. The Asserted Conflict With Second Circuit Decisions

The Union contends that the Fourth Circuit's decision in this case conflicts with *Chicago, Rock Island and Pacific R. R. v. Switchmen's Union*, 292 F. 2d 61 (2nd Cir. 1961). Such contention certainly would be received with shock in the Fourth Circuit, since that Court's opinion evidenced careful study of the *Chicago, Rock Island* opinion, and expressly followed that decision in the instant case. The Court cited the *Chicago, Rock Island* decision twice, approving the legal principles enunciated therein. But, at the same time, it pointed out critical factual distinctions in the two cases.

Moreover, in the *Chicago, Rock Island* case, the Second Circuit expressly refused to pass upon the question presented in this case. In that case, bargaining had actually resulted in agreement between union and company negotiators. Even so, the District Court found that a requirement of the Union's constitution that any agreement made by the union negotiators must be approved by a majority vote of the union membership, coupled with the negotiators' submission of the agreement to the union membership without recommending approval, was unlawful.

In considering the case, the Court of Appeals for the Second Circuit hypothetically posed the question of whether an injunction might issue in a case where: — "[T]he claim is that although the motions specified by the Railway Labor Act were performed, the required spirit was lacking. Appellees argue with force that *it is as much a violation of the Railway Labor Act to make only a token effort to comply with its prescribed processes as to strike without even the pretense; . . .*" (emphasis added), *Chicago, Rock Island and Pacific R. R. v. Switchmen's Union*, 292 F. 2d 61, 67 (2nd Cir. 1961).

It would be difficult to find words which more precisely or succinctly describe the issue which is raised in the instant case. Having found, however, that the plaintiff's evidence did not support its "claim" in the *Chicago, Rock Island* case, the Court ruled that *"We find it unnecessary here either to affirm or to deny that an injunction against a strike may be issued on such a claim, . . ."* (emphasis added), *Chicago, Rock Island and Pacific R. R. v. Switchmen's Union, supra*, at p. 67.

The Second Circuit went on to explain in detail that there was no substantial evidence in the *Chicago, Rock Island* case to support the plaintiff's claim or the District Court's finding that the Union there had not bargained in good faith. The only evidence tending to support the claim was the failure of union negotiators to recommend ratification of the negotiated agreement by the Union's membership.

That case bears no resemblance to this case, where, for example, it is in effect conceded that the union negotiators have openly admitted to Piedmont representatives that *"we have no authority to confer* on crew complement, and on this issue of crew complement *our authority to negotiate has been withdrawn"* (Saunders, pp. 5, 6, ¶11) and have repeatedly insisted that they were "bound" by the Union's "mandatory and compulsory policy" to refrain from bargaining on the crew complement subject (Saunders, p. 6, ¶11; Tadlock, p. 2, ¶3; Bradley, pp. 1-4, ¶¶2, 5, 7).

Further distinguishing the cases are the Union's statement to Piedmont that even if a two-man agreement were signed, it would be rejected by the Union's president (Saunders, p. 6, ¶11) and its declaration to its own member pilots that the authority of its negotiators was "extremely limited" and, in effect, that such an agreement was blocked by mandatory union policy (Tadlock, Exhibit C).

The Union labors at length over its claim that a conflict exists because, in construing Section 7 of the Norris-LaGuardia Act in the *Chicago, Rock Island* case, the Court of Appeals for the Second Circuit stated that a necessary prerequisite to injunctive relief is a showing that there has in fact been a violation and that is it not enough to show merely that the Act might have been violated.

But that section of the Norris-LaGuardia Act merely limits injunctions to cases where there are "findings of fact by the court, *to the effect* — (a) That unlaw-

ful acts . . . have been committed . . ." (emphasis added), Norris-LaGuardia Act §7, 29 U.S.C. §107. The composite findings and conclusions of the District Court and the Court of Appeals in this case are fully in accord both with the express language of Section 7 and the pronouncement of the Second Circuit.

The admissions of the union negotiators noted above were considered by the Court of Appeals to be clear "evidence that the Union did not bargain." Accordingly, it construed the District Court's order as a ruling "that the Union failed to negotiate in good faith as required by the Railway Labor Act" (Pet. App., p. 6a). Furthermore, the Court of Appeals expressly declared that "use of the by-law as an excuse for refusal to bargain . . . is not consistent [that is, not in compliance] with the Railway Labor Act's provisions . . ." (Pet. App., p. 6a). It is difficult to see how this can be said to fall short of a finding that the Union has violated the Railway Labor Act.

In apparent recognition that any defects in the findings and conclusions of the District Court were cured by the Court of Appeals, the Union insists that this Court should focus its attention exclusively upon the language of the District Court, as if it had never been amended or passed upon by the Court of Appeals. But this Court has repeatedly turned aside efforts of litigants thusly to inject it into the fact-finding processes of lower courts.

> "[T]he probative sufficiency of the testimony has the support of the district court . . . and of

the circuit court of appeals. It would take something more than ingenious criticism to bring even into question that concurrence or to detract from its assuring strength, . . ."

Delaney v. United States,
263 U. S. 586, 589-590 (1924),
quoted in *United States v.*
Johnson, 319 U. S. 503, 518
(1943)

"The petitioner asks us to reject as 'clearly erroneous' the factual conclusion . . . reached by the District Judge and accepted by the Court of Appeals. In order to do so, we would be forced to disregard this Court's repeated pronouncement that it 'cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.' . . . For there was no 'very obvious and exceptional' error in the conclusion of the two courts below. . . ."

Berenyi v. Immigration and
Naturalization Service,
385 U. S. 630, 635 (1967)

This presumption of validity of concurrent factual determinations is clearly applicable to Railway Labor Act cases. *Virginian Ry. v. System Federation No. 40,* 300 U. S. 515, 542 (1937); *Texas & New Orleans R. R. v. Brotherhood of Ry. & S. S. Clerks,* 281 U. S. 548 (1930).

What has been stated about the *Chicago, Rock Island* case is also true of the Union's claim that the instant case is in conflict with the decision of the Second Circuit in *Pan American World Airways, Inc. v. Flight Engineers Int'l. Ass'n.*, 306 F. 2d 840 (2nd Cir. 1962). It is axiomatic, of course, that the duty to bargain does not require concession or agreement. The *Pan American World Airways* case merely followed that axiom in finding no refusal to bargain. That case has no bearing where, as here, a union has unilaterally determined in advance that there will be no bargaining with respect to a bargainable issue and has consistently and adamantly enforced its unilateral determination.

The remaining cases as to which the Union claims there is conflict deal, not with labor law as such, but with the discretionary authority of lower courts in disputes over venue.

2. *Procedural Cases From Other Circuits*

Prior to the hearing in the District Court below, the Union moved that the case be transferred to the District of Columbia (Motion, August 8, 1969). Such motion was based upon venue considerations and the Union's contention that its case in the District of Columbia raised issues identical to those raised in the Company's case.

Piedmont responded with uncontradicted proof that its corporate existence, as well as the center of its operations, was at Winston-Salem, North Carolina; that practically all witnesses who would be in-

volved in the case resided in the Winston-Salem area; that all of the bargaining sessions with which the case was concerned were held at that location; that for many years grievance procedures and arbitration cases before the System Board of Adjustment invariably have been held in Winston-Salem; and that Piedmont had not sought, and would not seek, any affirmative relief in the Union's District of Columbia action (Bradley, Reply).

It was shown to the satisfaction of the District Court, moreover, that it was the sole purpose of the Union's District of Columbia action to test the Company's right to take unilateral action, and that the question of whether the Union had a right to take such action was never mentioned in the pleadings, or evidence, or affidavits, or arguments in the Union's case. It was conceded that at the time of the hearing in the District of Columbia there was no strike by the Union and no voiced threat that a strike would be called. Further, it was proved that whereas the Union's action was for declaratory and injunctive relief upon an alleged contract, the purpose of the instant case was to test the validity of the Union's strike activities before it had ever made any effort to reach agreement with Piedmont.

Upon the basis of these considerations, the District Court, in the exercise of its discretion, refused to transfer this case to the District of Columbia. The authorities amply support that decision.

"The transfer of pending civil cases from one district to another is governed by 28 U.S.C. §1404(a) which provides '(a) for the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.' The burden of establishing that the suit should be transferred is upon the movant and unless the evidence and the circumstances of the case are strongly in favor of the transfer the plaintiff's choice of forum should not be disturbed. The transfer lies within the sound judicial discretion of the trial judge and his determination should not be rejected unless the appellate court can say there has been a clear abuse of discretion."

Texas Gulf Sulphur Co. v. Ritter, 371 F. 2d 145, 147 (10th Cir. 1967)

See also: *Toti v. Plymouth Bus Co.*, 281 F. Supp. 897 (S.D. N.Y. 1968); *Blue Diamond Coal Co. v. United Mine Workers*, 282 F. Supp. 562 (E.D. Tenn. 1968); *New York Central R. R. v. United States*, 200 F. Supp. 944 (S.D. N.Y. 1961); *Mazinski v. Dight*, 99 F. Supp. 192 (W.D. Pa. 1951).

The cases cited by the Union as being in conflict on this question certainly present no inconsistency of a sort which could invoke the jurisdiction of this Court on writ of certiorari. In *Hilton Hotels Corp. v. Weaver*, 325 F. 2d 1010 (D.C. Cir. 1963), on the basis of "comity" only, the Court of Appeals for the

District of Columbia Circuit deferred to the Court of Appeals for the Third Circuit and refused to "reexamine" the latter Court's resolution of identical issues.

In *Crosley Corp. v. Hazeltine Corp.*, 122 F. 2d 925 (3rd Cir. 1941), the Court of Appeals for the Third Circuit expressly based its decision on the conclusion that the district court, "having the power to issue [a preliminary injunction to protect its jurisdiction] abused its discretion in refusing to exercise that power." *Id.* at 930. Likewise, in *Brotherhood of Locomotive Firemen & Enginemen v. Central of Georgia Ry.*, 411 F. 2d 320 (5th Cir. 1969), the Court of Appeals found abuse of discretion in the district court's refusal to transfer the case to another district court where the plaintiff had already secured an injunctive order identical to the one sued for in the later case.

At most, those cases differ from the instant case only in the outcome of the procedural questions presented. And, in each case, the outcome hinged, not upon conflicting interpretations of legal questions, but upon factual considerations peculiar to the case itself. Thus, with its assertions that this Court should take cognizance of such alleged "conflict," the Union again seeks to inject the Court into a review of the evidence and the inferences drawn from it by the Courts below.

II. The Courts Below Were Not Bound By The Obiter Dictum Of The District Court For The District Of Columbia

As is noted in the appendix to the Union's petition, the District of Columbia Court denied the Union's motion for an injunction enforcing the alleged contract for the following reasons, announced at the close of the hearing:

> ". . . Congress has in effect instructed the Courts not to intervene in these labor disputes unless there is some very obvious legal question, or some legal reason for coming into them.
>
> . . .
>
> "I think [that] before I could step in and grant an injunction . . . I would have to be convinced that there was a definite substantial legal issue in which the petitioner [plaintiff] had a very good chance of success.
>
> "I don't find that chance of success in this case. I am not convinced that there is a legal issue left in the case. So, I am going to deny the preliminary injunction" (Pet. App. E).

Later, that Court entered a written order and, even though no findings of fact were made on the subject, the Court adopted a so-called "conclusion of law," suggested by the Union, which stated that "the parties have, under the provisions of the Railway Labor Act, engaged in good-faith negotiations . . ." (Pet. App., p. 6d, ¶2).

The Court's decision being in favor of Piedmont, it is elementary, of course, that Piedmont could not possibly appeal from reasons advanced by the Court for ruling favorably to the Company. Yet, the Union insists that, regardless of whether or not it in fact refused to bargain with Piedmont, judicial inquiry into the subject is forever barred by the interlocutory dictum of the Court in that case. Otherwise stated, the Union is advancing the amazing proposition that a litigant's rights as to the merits of a case may be established adversely to him by recitations volunteered in a preliminary order in which he has prevailed and from which no appeal can be taken by him!

The reason and logic which so clearly refute the Union's novel contention are fully supported by numerous court precedents. In the first place, the doctrine of "the law of the case" applies only where two different judges rule upon the identical question in the same case, *e.g.*, *Bowles v. Wilke*, 175 F. 2d 35 (7th Cir.), cert. den., 338 U. S. 861 (1949). But it is not necessary for Piedmont to rely on that fact alone to sustain its position.

Even if the orders of Judges Corcoran and Gordon had been entered in the same case, the Union's contention could not be sustained. Judge Corcoran's "conclusion" on the subject of bargaining in the breach-of-contract case was nothing more than obiter dictum which could not serve as a bar to a subsequent finding to the contrary. Since at least as far back as 1821, this Court has considered that:

"It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious."

Cohen v. Virginia,
6 Wheat. 264, 399 (1821)

See also: *Osaka Shosen Kaisha Line v. United States*, 300 U. S. 98 (1937); *Wright v. United States*, 302 U. S. 583 (1938).

Moreover, even if the question had been squarely presented to Judge Corcoran on a preliminary motion such as the Union's, his interlocutory ruling would not have barred a second order in conflict with his first decision.

"In the absence of statute the phrase, 'law of the case,' as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power."

Messinger v. Anderson,
225 U. S. 436, 444 (1912)

"[The rule of the law of the case] is not applicable here because when the case was first re-

manded, nothing was finally decided. The whole proceeding thereafter was in fieri. . . . This was an interlocutory order that was appealable because Congress, notwithstanding its interlocutory character, had made it appealable. 28 USCA §1253, FCA title 28, §1253. The appellants might have appealed, but they were not bound to. We think that it requires a final judgment to sustain the application of the rule of the law of the case just as it does for the kindred rule of res judicata. Compare United States v. Wallace & Tiernan Co. 336 US 793, 800, 801, 93 L ed 1042, 1049, 1050, 69 S Ct 824. And although the latter is a uniform rule, the 'law of the case' is only a discretionary rule of practice. It is not controlling here."

United States v. United States Smelting, Refining & Mining Co., 339 U. S. 186, 198-199, reh. den., 339 U. S. 972 (1950)

"'There is sound reason for the rule that the decision of either the trial or appellate court in granting or denying the temporary injunction does not constitute the law of the case and will not estop the parties nor the court as to the merits of the case. . . .'"

Hunter v. Atchison, T. & S. F. Ry., 188 F. 2d 294, 299 (7th Cir. 1951)

See also: *Bowles v. Wilke*, 175 F. 2d 35 (7th Cir. 1949).

III. The Decision Below Is Entirely Consistent With Principles Enunciated By This Court And Is Fully Supported By Other Court Precedents

The state of the record is such that the Union's position on the merits necessarily is based upon the premise that the Union is authorized to dictate unilaterally in advance what a rule or condition of employment will be and then to meet with the carrier only to advise that its directive cannot and will not be changed, thus marking time until the calendar runs out on Railway Labor Act procedures — and, that in all of this the Union shall be free from any legal sanction. Court precedents uniformly refute that proposition.

In the landmark case construing Section 2 of the Railway Labor Act, 45 U.S.C. §152, and directing a carrier to "treat with" and "exert every reasonable effort to make and maintain agreements" with the representative of its employees, this Court stated:

> "It is, we think, not open to doubt that Congress intended that this requirement [to bargain] be mandatory upon the railroad employer, and that its command, in a proper case, be enforced by the courts. . . . Neither the purposes of the later Act, as amended, nor its provisions when read, as they must be, in the light of our decision in the Brotherhood of R. & S. S. Clerks Case, 281 U. S. 548, 74 L. ed. 1034, 50 S. Ct. 427, supra, lend support to the contention that its enactments, which are mandatory in form and capa-

ble of enforcement by judicial process, were intended to be without legal sanction."

Virginian Ry. v. System Federation No. 40, 300 U. S. 515, 545 (1937)

Very recently this Court emphasized that the duty imposed by Section 2 First rests equally upon carriers and unions: — "The heart of the Railway Labor Act is the duty, imposed by §2 First upon *management and labor*, 'to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes . . . in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof' " (emphasis added), *Brotherhood of R. R. Trainmen v. Jacksonville Terminal Co.*, 394 U. S. 369 (1969).

This Court further emphasized that in order to exhaust the procedures which ultimately can lead to authorized unilateral action: — "*A party* desiring to effect a change of rates of pay, rules, or working *conditions must give advance written notice* [, §6, and] must confer, §2 Second, . . ." In addition, the Court pointed out that "while the dispute is working its way through these stages, *neither party may unilaterally alter the status quo*. §§2 Seventh, 5 First, 6, 10" (emphasis added), *Brotherhood of R. R. Trainmen v. Jacksonville Terminal Co., supra*, at 377-378.

The actual power of the Petitioning Union to enforce its unilateral mandatory order with respect to crew complements on twin-engine jets should not be doubted — such order was totally effective. Of the 438 twin jets now in service on the airlines, 348 are being flown with two-man crews. But all of these within the Union's jurisdiction are being so operated only because the Union earlier gave its consent and approval. Piedmont's principal competitors are in this category (Saunders, p. 7, ¶12; Saunders Supp., p. 2, ¶4). Among the ninety remaining twin jets, not one of those covered by the Union's edict has flown with fewer than three crewmen since the Union's order was issued in 1966.

The Union undertakes to justify its mandatory order with the argument that it is interested in safety and that, as to its "revised pilot crew complement policy . . ., there never has been any substantiated contention that this was based on other than safety considerations" (Pet., p. 6).[1] But that in no way justifies the Union's refusal to bargain with Piedmont on the subject. The carrier certainly has a legitimate interest in air safety. Indeed, it has no alternative.

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[1]In controverting this assertion, Piedmont has challenged the Union in bargaining (Bradley, p. 3, ¶ 7; Saunders, pp. 6, 7, ¶ 12, p. 8, ¶ 15), and throughout this case, to justify its discrimination between the twin jets on which it has agreed to place two crewmen and those which it has refused to fly with less than three crewmen. That challenge has been ignored by the Union.

In regulating safety in air commerce, Congress admonished the Federal Aviation Agency that:

> "In prescribing standards, rules, and regulations, and in issuing certificates under this subchapter, the Administrator shall give full consideration to the duty resting upon air carriers to perform their services with *the highest possible degree of safety in the public interest*" (emphasis added).
>
> Federal Aviation Act of 1958, §601(b), 49 U.S.C. §1421(b)

Congress certainly did not intend to permit the Union to set itself up as a dictator of air safety policies.

> "The Federal Aviation Act of 1958 (49 U.S. C.A. §§1301-1542), imposed upon the [Administrator] the duty and responsibility of promulgating rules and regulations to provide adequately for *the highest possible degree of safety in air commerce*. The Administrator is directed to exercise and perform his powers and duties under the Act in such manner as 'will best tend to reduce or eliminate the *possibility* [emphasis by the Court] of, or recurrence of, accidents in air transportation.' 49 U.S.C.A. §1421(b)" (emphasis added).
>
> *Air Line Pilots Ass'n. v. Quesada*, 182 F. Supp. 595, 598 (S.D. N. Y.), aff'd., 276 F. 2d 892 (2nd Cir. 1960)

Although the Federal Aviation Agency has authorized operation of all twin jet aircraft in question with two men and has directed that any additional crewman shall not be assigned any duties other than monitoring the company radio, the Union argues that it is *free to bargain* for more stringent safety policies than are provided for by that Agency. That may well be true, but the point is that the Union *refused* to bargain on the subject — and its *right* to bargain in no way excuses its *refusing* to do so.

A primary defense of the Union is its claim that the procedures of the Act were "fully exhausted" by its attendance at bargaining sessions with Piedmont, notwithstanding its flat refusal to consider any alternative to its mandatory policy during these meetings. It is elementary, of course, that perfunctory gestures do not fulfill the good-faith bargaining requirements of the Act.

> "To effectuate the purposes of the [Railway Labor] Act and to prevent a mockery of its requirements such efforts [to resolve the dispute] must be reasonable and made in good faith and not simply to satisfy perfunctory compliance."
>
> *Long Island R. R. v. Brotherhood of R. R. Trainmen,* 185 F. Supp. 356, 358 (E.D. N.Y. 1960)

"If compliance with the [Railway Labor] Act need only be perfunctory, the congressional man-

date would be defeated and the purposes of the Act rendered nugatory."

Pan American World Airways, Inc. v. Brotherhood of Ry. and S. S. Clerks, 185 F. Supp. 350, 353 (E.D. N.Y. 1960)

Legions of cases have consistently held this to be true even under the less demanding bargaining requirements of the National Labor Relations Act.

"The bargaining required by the Act does not mean mere talk with the purpose of avoiding agreement, but a good faith effort to reach agreement. . . ."

National Labor Relations Board v. Darlington Veneer Co., 236 F. 2d 85, 88 (4th Cir. 1956)

"[T]he duty to bargain in good faith is not satisfied by merely meeting with union representatives to inform them that the employer cannot or will not change its position."

National Labor Relations Board v. Israel Putnam Mills, 197 F. 2d 116, 117 (2nd Cir. 1952)

"Collective bargaining means something more than mere talk by those who have decided in advance not to bargain at all with respect to so vital a matter as the rate of wages and to reserve to

themselves the right to control same by unilateral action."

National Labor Relations Board v. Berkley Machine Works & Foundry Co., 189 F. 2d 904, 907 (4th Cir. 1951)

"The Board's position is that an employer who insists upon reserving the right to act unilaterally and of its own will alone upon matters involving legitimate collective bargaining and denies the employees any contractual provision for opportunity to bargain collectively with regard thereto thereby refuses to bargain collectively within the meaning of the Act."

Singer Mfg. Co. v. National Labor Relations Board, 119 F. 2d 131, 136 (7th Cir. 1941)

"Applying the rule here, we think the circumstances of this case support the Board's finding that the employer, while freely conferring, did not approach the bargaining table with an open mind and purpose to reach an agreement consistent with the respective rights of the parties."

Majure v. National Labor Relations Board, 198 F. 2d 735, 739 (5th Cir. 1952)

Finally, it is argued by the Union that the Norris-LaGuardia Act has placed the Union beyond the reach of the courts. Such argument has been refuted completely and repeatedly in court precedents.

"We hold that the Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes. There must be an accommodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved.

. . .

"[T]he specific provisions of the Railway Labor Act take precedence over the more general provisions of the Norris-LaGuardia Act.

" 'Our conclusion is that the *District Court has jurisdiction and power to issue necessary injunctive relief orders* [to enforce compliance with the requirements of the Railway Labor Act] notwithstanding the provisions of the Norris-LaGuardia Act' " (brackets are the Court's, emphasis added).

Brotherhood of R. R. Trainmen v. Chicago River & Indiana R.R., 353 U. S. 30, 40, 42 (1957)

These principles were reconfirmed in *Order of R. R. Telegraphers v. Chicago and North Western R. R.*, 362 U. S. 330 (1960), where the Court stated:

"[A] strike could be enjoined to prevent a plain violation of a basic command of the Railway Labor Act 'adopted as a part of a pattern of labor legislation.' "

Order of R. R. Telegraphers v. Chicago and North Western R. R., supra, at 339

Cases from the courts of appeals have followed and amplified the pronouncements of this Court dealling with the subject of accommodation of these two Acts.

"That principle of accommodation means that actions to enjoin violations of the Railway Labor Act may be maintained without regard to Section 4 of the Norris-La Guardia Act. . . . That is the conclusion of other courts which have considered the matter, and we agree. The point is, simply that *Congress did contemplate actions to effectuate the Railway Labor Act by enjoining violations*. That purpose would be utterly defeated if the federal court actions involved were subject to Section 4 of the Norris-La Guardia Act, which had provisions for withholding injunctions in labor disputes reflecting entirely different objectives" (footnotes omitted, emphasis added).

Brotherhood of R. R. Trainmen v. Akron & Barberton Belt R. R., 385 F. 2d 581, 613-614 (D.C. Cir. 1967), cert. den., 390 U. S. 923 (1968)

"It is not here disputed that Norris-La Guardia Act will not apply to preclude injunctive relief in cases in which the acts to be enjoined are in violation of the Railway Labor Act. . . . Whether or not any provision of the Railway Labor Act had been violated by either or both of the opposing

parties, was and is precisely the subject of the consolidated merits case. . . . Certainly, as noted, if the strike was so illegal, Norris-La Guardia Act would not apply to deprive the District Court of jurisdiction to enjoin it" (footnotes omitted).

Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook R. R., 380 F. 2d 570, 583 (D.C. Cir. 1967)

"It is well settled that injunctive relief may be granted to vindicate the processes of the [Railway Labor] Act regardless of the provisions of the Norris-La Guardia Act."

Pan American World Airways, Inc. v. International Brotherhood of Teamsters, 275 F. Supp. 986, 999 (S.D. N.Y. 1967), affirmed on the basis of the opinion below sub. nom., *Brotherhood of Ry. Clerks v. Pan American World Airways, Inc.*, 404 F. 2d 938 (2nd Cir. 1969)

Accord: *Pennsylvania R. R. v. Transport Workers Union*, 191 F. Supp. 915, 921 (E. D. Pa.), aff'd., 280 F. 2d 343 (3rd Cir. 1960); *Chicago, Burlington & Quincy R. R. v. Railway Employes' Dept.*, — F. Supp. —, 60 LC ¶10, 071 (D.D.C. 1969); *Western Air Lines, Inc. v. Flight Engineers Int'l. Ass'n.*, 194 F. Supp. 908, 910-911 (S. D. Cal. 1961). See also, *Norfolk & Portsmouth Belt Line R. R. v. Brotherhood of R. R. Train-*

men, 248 F. 2d 34, 45-46 (4th Cir. 1957); *Southern Ry. v. Brotherhood of Locomotive Firemen and Enginemen*, 223 F. Supp. 296, 305 (M. D. Ga. 1962), aff'd., 324 F. 2d 503 (5th Cir. 1963); *Pennsylvania R. R. v. Transport Workers Union*, 202 F. Supp. 134, 137 (E. D. Pa. 1962); *American Airlines, Inc. v. Air Line Pilots Ass'n.*, 169 F. Supp. 777, 783-789 (S. D. N. Y. 1958); and *American Airlines, Inc. v. Transport Workers Union*, 202 F. Supp. 806, 810-811 (S. D. N. Y. 1962).

The Union argues that the decision here is inconsistent with *Brotherhood of R. R. Trainmen v. Toledo, Peoria & Western R. R.*, 321 U. S. 50 (1944), where, applying the equitable doctrine of "clean hands," an injunction was denied because the carrier had rejected arbitration proferred by the National Mediation Board and accepted by the union. But there is here no such inconsistency with that ruling. In the *Toledo* case, it was admitted on all sides that all of the procedures of the Railway Labor Act had been fully exhausted by the parties acting in good faith. That the *Toledo* holding has no application here is further shown by the holdings in the *Akron & Barberton Belt R. R.* cases, *supra*.

> ". . . [L]ack of clean hands may be overcome by a balancing of interests, particularly where it is the public interest involved. In a particular case the District Court might conclude that the question of the applicability of Section 8 was doubtful, would require time to explore, and that

the restraining order should issue forthwith to avoid jeopardizing the Railway Labor Act. Such approaches would recognize that Section 8 of the Norris-La Guardia Act has some applicability, and is a legislative instruction that weighs heavier in the scale than the clean hands doctrine taken merely as a general equity maxim, yet is overborne by requirements of the Railway Labor Act."

Brotherhood of R. R. Trainmen v. Akron & Barberton Belt R. R., supra, at 614

In the injunctive order in the case at bar, the District Court detailed a number of ways in which the general public was suffering, and would continue to suffer, "irreparable injury and damage" if the strike were not enjoined (Pet. App., pp. 3b-4b). Indeed, in *Chicago, Burlington & Quincy R. R. v. Railway Employes' Dept.*, — F. Supp. —, 60 LC ¶10, 071 (D. D. C. 1969), the Court held that public interest required that the strike be enjoined at the behest of the carrier, notwithstanding that it was found as a fact that such carrier had bargained in bad faith. But in the present case, there is not even any contention that Piedmont failed to bargain in good faith.

CONCLUSION

Upon the basis of all the foregoing, the Respondent, Piedmont Aviation, Inc., urges that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

EXCERPT FROM PAGE 108 OF TRANSCRIPT OF PROCEEDINGS BEFORE THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA ON AUGUST 13-14, 1969

(P. 108)

THE COURT: Both of you come up here—I'm inclined to — if I can get the public some relief about this thing — I can understand their position, you know, and I'm inclined to do something by way of some injunctive relief. Isn't there some way we can resolve this matter so that we can let the matter come on for hearing on its merits? We are not behind in this district like they are in some other districts, and I would be willing to expedite the hearing on the record and get the matter heard on its merits as soon as possible. Isn't there something we could agree on and resolve this thing?

EXCERPTS FROM PAGES 3 AND 18 OF TRANSCRIPT OF PROCEEDINGS BEFORE THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA ON JULY 16, 1969

(P. 3)

Basically, aside from the Railway Labor Act statutory overtones, we have here a suit based upon breach of contract. The pilots claim that they have an existing agreement with Piedmont which requires the carrier to continue with the three pilot crew complement on B-737 aircraft for the duration of the present collective bargaining agreement.

The Pilots assert that this three-pilot crew is required by virtue of a decision in an arbitration between ALPA and United Air Lines which Piedmont and ALPA agreed to abide by in their agreement.

(P. 18)

A preliminary injunction is necessary to preserve the status quo until a final decision can be made. The choice would seem to be unilateral action by Piedmont with a response by the Pilots or an orderly process by which the parties determine their respective obligations under the agreement, and then go forward.

The pilots have opted at this time for a preliminary injunction to preserve the status quo so that each side will be fully aware of its legal obligations and will be able to carry them out before any economic action or economic battle ensues on the airline.